Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Automatic and Manual Roaming	)	WT Docket No. 00-193
Obligations Pertaining to	)	
Commercial Mobile Radio Services	)	

To: The Commission

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner
Senior Vice President – Government Affairs

Lawrence R. Krevor
Vice President – Government Affairs

Laura L. Holloway
Director – Government Affairs

James B. Goldstein
Regulatory Counsel

2001 Edmund Halley Drive
Reston, VA 20191

(703) 433-4141

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SUMMARY

The Commercial Mobile Radio Service ("CMRS") marketplace has never been more competitive and wireless consumers have never been better off. As the record in this proceeding demonstrates, the CMRS marketplace will become even more competitive as carriers launch new services, differentiate their product offerings, pursue new technological innovations (*e.g.*, dual and triple mode handsets, access to Internet services and Third Generation ("3G") technologies), reduce prices and offer a variety of service and pricing plans. Accordingly, no evidence exists of a CMRS marketplace failure justifying the Federal Communications Commission ("Commission") imposing a CMRS automatic roaming mandate – particularly when it never imposed such regulation in the cellular duopoly marketplace. If unnecessary to protect competition in a market with only two facilities-based providers, requiring automatic roaming is not warranted in a marketplace with multiple robust competitors.

On the contrary, mandatory automatic roaming could result in significant consumer harm by creating disincentives for carriers to build facilities, invest in technology and differentiate products and services. The Comments of Southern LINC ("Southern"), a regional CMRS provider in the southeastern states, aptly demonstrate the disincentives this mandate would provoke. Southern readily admits that it seeks mandated automatic roaming with a nationwide CMRS carrier to gain nationwide coverage without having to "undertake significant investment to develop the necessary infrastructure to address [] significant technical difficulties and reach economies of scale." Southern establishes for the record that the proposed rule will reduce long-term facilities-based competition among commercial wireless service providers. As Chairman

Powell has recognized, "meaningful, robust competition requires that firms vie for customers on the distinct assets and capabilities that each brings to the market."

The competitive disincentives created by an automatic roaming mandate are particularly acute when potential roaming carriers provide service in overlapping markets. Mandated in-market roaming significantly exacerbates the diseconomies created by the company that chooses to compete by being a "free rider" on a competitor's system. This allows the "free-rider" to enhance its own in-market system, not through investments in technical or operational improvements, but by using the competitor's system to fill coverage holes and provide peak capacity. In essence, the competitor's network becomes a back-up system to cover for the frailties of the "home" system, filling in coverage holes or providing additional system capacity at peak times of the day – a particularly egregious result when the "roamed-on" network is forced to increase capacity to serve its own customers as a result of the infrastructure impact of the roamer's usage.

Additionally, Commission adoption of a CMRS automatic roaming mandate would be a regulatory step backwards. If it adopts an automatic roaming requirement, the Commission will face numerous issues regarding whether the rates, terms and conditions of a particular roaming agreement are just, reasonable and nondiscriminatory. Since the marketplace would no longer dictate whether to enter into such an agreement, nor dictate the most economic rates, terms and conditions of such an agreement, it would inevitably fall to the Commission to review, adjudicate and approve these matters. As a number of commenters stated, roaming agreements are complex arrangements raising numerous case-specific issues. The Commission's regulation thereof would have to be sufficiently flexible to permit carriers to differentiate their roaming terms from competitor-to-

competitor, yet not so broad as to make the system unworkable. Given the competitiveness of the CMRS marketplace, and the Commission's current Sections 201, 202 and 208 enforcement processes, a new roaming regulatory scheme is unjustified and would impose unnecessary costs on consumers without any corresponding benefit.

An automatic roaming mandate is not warranted in the overall CMRS marketplace; there is even less justification for singling out one subset of CMRS competitors – digital Specialized Mobile Radio providers – for an automatic roaming obligation. Congress mandated in 1993 that all CMRS competitors receive regulatory parity to ensure that the marketplace – not governmental regulation – governs carriers' competitiveness. Southern's proposal to limit the automatic roaming mandate – for all practical purposes – to a single carrier, Nextel Communications, Inc. ("Nextel"), is far beyond the bounds of CMRS regulatory parity and thus impermissible.

Interestingly, Southern's position is predicated on its fanciful assertion that Nextel's nationwide CMRS network is an "essential facility," *i.e.*, that Nextel is a public utility which all-comers are entitled to access. Southern's reasoning fails on numerous grounds, including the fact that (1) Nextel provides service to only seven million of the more than 100 million CMRS subscribers in today's marketplace – hardly a monopoly or "dominant carrier" position warranting "bottleneck facility" government-mandated competitive access; (2) Nextel's network is only one of six nationwide CMRS networks; and (3) a plethora of spectrum is available in both the secondary markets and in Commission auctions for nationwide and near-nationwide CMRS services. For example, the C and F Block Personal Communications Services re-auction, which recently closed, provided an ideal opportunity for Southern to obtain a nationwide footprint. Southern

chose, however, not to make this investment, seeking instead to obtain a nationwide footprint for free through Commission mandate.

Furthermore, Southern's attempt to carve itself and Nextel out of today's competitive CMRS marketplace and into their own micro "relevant marketplace" further ignores reality, as its own Comments indicate. Southern would limit the Commission's competitive analysis for determining whether to mandate automatic roaming to ***non-interconnected trunked dispatch*** service. Southern fails to inform the Commission, however, that it intends to provide only ***interconnected mobile telephone*** service via its proposed automatic roaming mandate – *i.e.*, the very services numerous competitors offer, including Voicestream, Verizon, AT&T Wireless, and Sprint PCS. Southern's attempt to delude the Commission into believing that it competes only with Nextel is transparent. There is no separable digital SMR marketplace for purposes of evaluating the need for mandated automatic roaming.

The Commission's job is to protect competition; not competitors. As the record in this proceeding aptly demonstrates, competition is flourishing in the CMRS marketplace. The proposed governmental intervention is not necessary to protect or enhance competition. On the contrary, such regulation would protect a few competition-adverse carriers at the expense of wireless consumers. Accordingly, a CMRS automatic roaming mandate is not in the public interest.

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I. INTRODUCTION

Nextel Communications, Inc. ("Nextel") respectfully submits these Reply Comments in the above-captioned proceeding.[1] At its heart, this proceeding queries whether the Federal Communications Commission ("Commission") should mandate that all Commercial Mobile Radio Service ("CMRS") providers allow competitors to access their networks via roaming arrangements, without regard for the economics of any particular transaction. Chairman Powell previously recognized that such policies may not be in the public interest, noting that "unconstrained access [to the facilities of other carriers] would eviscerate incentives for entrants to install their own facilities and thereby inhibit the type of competition most likely to spur innovation, provide price discipline and otherwise benefit consumers.... [M]eaningful, robust competition requires that firms

[1] *In the Matter of Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Services,* Notice of Proposed Rulemaking, WT Docket No. 00-193, FCC 00-361, released November 1, 2000 ("Notice").

vie for customers based on the distinct assets and capabilities that each brings to the market."[2]

Thirteen parties, including Nextel, submitted Comments in this proceeding. All but three oppose an automatic roaming requirement in favor of continued Commission reliance on the competitive marketplace to protect consumers and further enhance the products, services and technology options available to wireless users. As the record herein overwhelmingly demonstrates, the CMRS marketplace is competitive and will continue to grow increasingly so as carriers launch new services, differentiate their product offerings, pursue new technological innovations (*e.g.*, dual and triple mode handsets, access to Internet services and Third Generation ("3G") technologies), reduce prices and offer a variety of service and pricing plans.

Nextel, therefore, submits this Reply to demonstrate that mandated automatic roaming will inhibit the development of true facilities-based competition, thereby denying consumers differentiated products and services, and plunge the Commission into an unavoidable regulatory morass concerning roaming rates, terms and conditions that would further stifle robust competition. Nextel also responds herein to unsubstantiated allegations, factual misstatements and faulty legal analyses throughout the Comments of Southern Communications Services, d/b/a Southern LINC (hereinafter "Southern"), a CMRS competitor seeking to impose automatic roaming obligations on only one sub-set of CMRS provider, digital Specialized Mobile Radio ("SMR") providers.[3] As a practical

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[2] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, and *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Second Further Notice of Proposed Rulemaking, 14 F.C.C.R. 8694, FCC 99-70, released April 16, 1999 ("Local Competition Second FNPRM"), Commissioner Powell separate statement at p. 1.

[3] Comments of Southern LINC, filed January 5, 2001 ("Comments of Southern"). Similarly, the Comments of Pacific Wireless Technologies, Inc. ("Pacific Wireless") rely on the same faulty legal

matter, Southern's proposal would impose an automatic roaming obligation only on Nextel because Nextel is the digital SMR provider that has made the investment necessary to provide coverage sufficient to benefit any other CMRS provider interested in a roaming agreement.

For the reasons discussed herein and in the majority of the Comments, the Commission should not interfere with the functioning of a competitive marketplace that plainly is benefiting U.S. wireless consumers by imposing mandatory automatic roaming obligations on any CMRS carrier.

II. THE COMPETITIVE CMRS MARKETPLACE OBVIATES THE NNED FOR COMMISSION INTERVENTION

A. The CMRS Marketplace Is Competitive

As the Commission has recognized, and a majority of the commenters herein demonstrated, there is significant competition in the CMRS industry.[4] This competition, created by the Commission's licensing decisions and the various products and services of cellular, Personal Communications Services ("PCS") and SMR licensees, ensures that consumers have numerous choices of wireless telecommunications service providers – choices among differing technologies, pricing plans, service footprints, and service options, among other things. Far from being harmed by the current state of competition, consumers have benefited tremendously as a result of CMRS competition.[5]

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analysis proffered by Southern. Thus, Nextel also is responding herein to the assertions of Pacific Wireless.

[4] *See, e.g.*, Comments of Leap Wireless International, Inc. ("Leap Wireless") at p. 2; Comments of United States Cellular Corp. ("US Cellular") at p. 5; Comments of Office of Advocacy, U.S. Small Business Administration ("Small Business Administration") at p. 2; Comments of Verizon Wireless ("Verizon") at p. 2; Comments of Cellular Telecommunications and Internet Association ("CTIA") at p. 3.

[5] *See, e.g., In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* Fifth Report, FCC 00-289, released August 18, 2000 (hereinafter "Fifth Report on Competition")

Competition among CMRS providers is expected to grow as carriers move to 3G technologies. An automatic roaming mandate could interfere with marketplace decisions regarding 3G technologies and their timely deployment; it also could impose significant burdens and costs on carriers.[6] With as many as five or more facilities-based CMRS providers in most markets, it is difficult to ascertain how an automatic roaming mandate can be justified today when it was never justified even in the cellular duopoly marketplace. If unnecessary to protect competition in a market with only two facilities-based providers, such regulation cannot be justified in a marketplace with multiple robust competitors.

It is axiomatic that the Commission's job is to protect competition; not competitors.[7] Competition in the CMRS marketplace is flourishing, as Congress intended,[8] and any automatic roaming obligation is unjustified in today's CMRS marketplace. Southern's proposed digital SMR-only automatic roaming mandate, discussed in greater detail below, is particularly unjustified as it would contravene the Commission's regulatory parity requirements and benefit no one other than Southern. With multiple facilities-based wireless providers in a market, **consumers** are not harmed

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at p. 4 ("In the year 2000, the CMRS industry continues to benefit from the effects of increased competition as evidenced by lower prices to consumers and increased diversity of service offerings.").

[6] *See* Comments of National Telephone Cooperative Association ("NTCA") at p. 5 ("As technology advances and the transmission of data become prevalent, it is unlikely that all carriers will upgrade at the same pace. NTCA's members warn that an automatic roaming requirement would be unworkable if, for example, their systems were incapable of handling the type of traffic carried by larger carriers.").

[7] *See* Brunswick Corp. v . Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)(Antitrust laws were enacted for 'the protection of competition; not competitors'")(citations omitted); *see also SBC Communications Inc., v. FCC*, 56 F.3d 1484, 1492 (D.C. Cir. 1995) (noting BellSouth's "mistaken belief that the Commission should protect competitors at the expense of consumers); *Hawaiian Telephone v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) ("relative competitive positions of ... carriers ... is of little relevance in determining whether the public interest test is satisfied").

[8] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993), discussed below.

by a particular carrier's self-inflicted coverage limits.[9] System coverage is – and should continue to be -- one of many competitive product-differentiating factors consumers weigh in choosing among providers in a competitive wireless marketplace.[10] Improving and enhancing system coverage does not come cheaply or easily; thus, carriers should be entitled to use such investment to promote the advantages of their products and services – just as they differentiate themselves based on technology, pricing, billing or customer care, among other things.

Similarly, if a carrier makes a significant investment in another carrier, either purchasing an interest therein, merging with that carrier or entering into some other venture, those carriers should be permitted to enter into roaming arrangements on more favorable terms than they would with non-affiliates. Having made the investment to expand their coverage and/or services through these business transactions, the carriers should be entitled to benefit from their investment and enjoy the economies and competitive opportunities they have created for themselves.[11] Forcing similar terms and conditions on all roaming arrangements via regulatory mandate would have a "chilling effect" on roaming rates "and would eliminate one of the primary benefits carriers have sought to obtain by making acquisitions or by entering into strategic alliances."[12] Therefore, the Commission should "stay the course" and allow the marketplace to continue promoting the competition that Congress and the Commission have facilitated to date.

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[9] Southern's Comments claim that consumers are harmed by the lack of an automatic roaming mandate when, in reality, consumers have numerous competitive alternatives. Southern's customers knew they were choosing a limited coverage service that they presumably accept as a price/service tradeoff.

[10] *See e.g.*, Comments of Cingular Wireless LLC ("Cingular") at p. 7.

[11] *See* Comments of Verizon at pp. 12-13.

[12] *Id.* at p. 13.

B. A Roaming Mandate Eliminates the Incentive To Build Systems and Provide a Differentiated Product

In stark contrast to any consumer benefit that may be achieved, a mandatory roaming obligation actually could result in significant consumer harm by creating a disincentive for carriers to build facilities, invest in technology and differentiate products and services -- as Chairman Powell has stated. The Commission has recognized the disincentive that can be created by such regulatory intervention. In reviewing and deciding to sunset its cellular resale rules, for example, the Commission reasoned that a resale mandate could harm facilities-based competition by creating a disincentive to build out networks and deploy innovative technologies.[13]

Following the same logic, the Commission queried in the instant Notice whether an automatic roaming mandate would "create disincentives to the growth of facilities-based competition, or to the continued deployment of nationwide footprints."[14] In their Comments, Nextel, CTIA and Cingular Wireless LLC ("Cingular") each warned that an automatic roaming mandate would create disincentives to invest in spectrum, build networks and differentiate products and services through innovative technology development.[15]

Southern confirms these concerns. In explaining why it needs mandated access to Nextel's network via roaming, Southern asserts that it cannot look to other spectrum opportunities or technology options for providing a nationwide service because it would have to ***"undertake a significant investment to develop the necessary infrastructure to***

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[13] *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services,* First Report and Order, 11 FCC Rcd 18445, para. 30 (1996), *aff'd Cellnet Communications v. FCC,* 149 F.3d 429 (6th Cir. 1998).

[14] Notice at para. 22.

[15] *See* Comments of Nextel at pp. 12-14; Comments of Cingular at p. 1; Comments of CTIA at p. 6.

address these significant technical difficulties and reach economies of scale."[16] In other words, Southern prefers what CTIA defines as the "free rider" approach.[17] Knowing it can build a limited, low-investment network and then rely on the more robust and geographically-expansive networks deployed by its competitors, a "free rider" avoids the risk of investing in and establishing new networks and providing new, differentiated products and services to the public. For example, Southern did not even sign up for participation in the 1.9 GHz C and F Block PCS re-auction. Had Southern participated in the auction and obtained a near-nationwide C and F Block footprint, wireless consumers would have benefited significantly – certainly more than they would from a me-too, resold nationwide service via Nextel's existing network, and arguably even more than they will benefit from the majority of C and F Block licenses going to large CMRS incumbents with pre-existing nationwide footprints.

Having failed to participate in Commission auctions and in the secondary spectrum markets, Southern has chosen not to make the investment necessary to create the nationwide presence it seeks to obtain via governmental mandate. Government complicity in a scheme, no matter how inadvertent, is irreconcilably at odds with the overriding goals of Congress in the 1993 Budget Act, one of which is to "**promot[e]**

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[16] Comments of Southern at p. 32. Not only is Southern uninterested in making investments to improve its competitiveness, it apparently has little interest in making the infrastructure investments necessary to meet its Commission obligations as a CMRS licensee. In attempting to impose a roaming obligation on Nextel via the Commission's Phase II Enhanced 911 proceeding, Southern readily admits that it has not even tested a Phase II location technology – nearly three months after Southern should have reached a decision on what type of technology to deploy. *See* Fourth Memorandum Opinion and Order, CC Docket No. 94-102, FCC 00-326, released September 8, 2000, at para. 78, requiring CMRS carriers to submit their technology choice to the Commission by November 9, 2000. Southern goes on to say that "it may find that it also has no alternative but to implement a handset-based solution[,]" *i.e.* the solution in which Nextel has invested significant time, resources and personnel to investigate, analyze, test and begin to develop.

[17] Comments of CTIA at pp. 6, 7. A Commission mandate "may actually reduce incentives for carriers to build out their networks since they can rely on roaming, thereby eliminating consumer choice."

investment in mobile telecommunications infrastructure. . ."[18] The Commission's policies should encourage facilities-based investment in competition; not discourage it.

The competitive disincentives created by an automatic roaming mandate are particularly acute when the two potential roaming carriers provide service in overlapping markets.[19] As Verizon stated, "[a]llowing licensees in the same market to roam on other licensees' systems creates disincentives to build out networks and strains. . .capacity."[20] The Commission recognized these particular disincentives in the Notice by requesting comment on whether any "automatic roaming rule should require a carrier to enter an automatic roaming arrangement on a nondiscriminatory basis with a facilities-based competitor in the same market (`in-market roaming')."[21] Anticipating the potential economic consequences of such in-market roaming arrangements, the Commission further queried whether such "agreements diminish carriers' incentives for building out their networks[.]"[22]

Mandated in-market roaming significantly exacerbates the diseconomies of the "free rider" problem. It would allow a provider to enhance its own in-market system, not through any investment in technical or operational improvements, but by using its competitor's system to fill coverage holes and provide additional capacity at peak usage times – a particularly egregious result where the roamed-on carrier already experiences capacity limitations in serving its own customer base.[23] In essence, the competitor's

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[18] Third Report and Order, 9 FCC Rcd 7988 (1994) ("hereinafter "CMRS Third Report and Order") at para. 11 (emphasis added).
[19] Comments of Verizon at pp. 11-12.
[20] *Id.* at p. iii.
[21] Notice at para. 27.
[22] *Id.*
[23] According to the Strategis Group, a consulting firm with extensive experience in telecommunications industry research, Nextel will need additional capacity – which it is attempting to acquire through the secondary marketplace – "to continue to grow its subscriber base and offer consumer services as well [as its

network becomes a back-up system to cover for the frailties of the "home" system. There is no public policy justification for imposing a governmental mandate that creates this result. Thus, to the extent the Commission concludes that the CMRS marketplace is not operating properly without an automatic roaming mandate, it should except from the requirement any and all roaming agreements between parties with overlapping footprints. Such "poaching" on a competitor's system flies in the face of facilities-based competition and the Commission's pro-competitive policies.

Additionally, "free riders" – whether Southern or any other CMRS provider -- deprive consumers of distinct product and service alternatives because, in essence, they are simply reselling the services of a facilities-based provider.[24] As Cingular noted, "[i]nstead of a variety of competitors differentiated in product quality, coverage, and features, all the competitors would appear more or less alike."[25] Those seeking an automatic roaming mandate, Cingular observed, simply want to eliminate "coverage and roaming footprints [as a] competitive factor."[26] Cingular also points out that rural areas could suffer disproportionately by the disincentives created by an automatic roaming obligation. Because cellular carriers have been building networks since the late 1970s, many have built out in rural areas. If those carriers are obligated to provide automatic

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business-oriented services]." "The State of the SMR Industry: Nextel and Dispatch Communications," The Strategis Group, September 2000 (hereinafter "The Strategis Group Report") at p. 48. Thus, if forced into roaming arrangements with carriers that have overlapping coverage areas, Nextel may be unable to provide quality services to its own customers because its system capacity is being used by "roamers" in their home market but unable to access their home system.

[24] This resale analogy is particularly applicable to another commenter in this proceeding, Pacific Wireless. As an iDEN provider with a network covering little more than a few coastal areas in California as well as Fresno and Sacramento, Pacific Wireless' request to roam on Nextel's nationwide system is little more than a request to resell Nextel's services in every area of the country but a few cities in California. Pacific Wireless seeks to construct a handful of cell sites and then provide nationwide service via the network Nextel has constructed nationwide. The Commission's CMRS resale requirements sunset in 2002; they should not be reenacted through the side door.

[25] Comments of Cingular at pp. 6-7.

[26] *Id.* at p. 7. *See also* Comments of Leap Wireless at pp. 5-7.

roaming to other CMRS carriers, for example, there will be little incentive among new entrants to build competitive systems in those areas.[27]

Commenters supporting an automatic roaming mandate are arguing that access to a nationwide wireless network has become the "right" of all competitors rather than a competitive factor upon which the carrier that created it has a right to distinguish itself.[28] In effect, they ask the Commission to treat nationwide wireless providers as public utilities – monopolists in control of bottleneck essential facilities. One commenter goes so far as to analogize the need for a nationwide wireless footprint to a CMRS carrier's need to interconnect to the Public Switched Telephone Network ("PSTN").[29] This analogy is inapt. Without interconnection to the PSTN (still a bottleneck facility in many markets today) a CMRS carrier cannot provide service. Without access to a particular nationwide wireless network, a carrier still can provide service within the scope of its own footprint and the footprints of those carriers with whom it has roaming agreements. The lack of a nationwide footprint is not a prerequisite to providing competitive CMRS services, as demonstrated by Leap Wireless.[30] Some CMRS carriers offer large, multi-state and national footprints while others, such as Leap, offer more localized coverage.[31] To the extent a carrier's coverage is not sufficient for a particular wireless consumer, he or she can look to other wireless providers – in many markets five, six or seven alternatives.

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[27] Comments of Cingular at p. 7.
[28] *See* Comments of Corr Wireless Communications, LLC ("Corr") at p. 8 (A roaming "rule is essential to ensuring that customers of all systems have fair and reasonable access to the nationwide network when they are outside their home market.").
[29] *Id.* at p. 8.
[30] Comments of Leap Wireless at pp. 5-6.
[31] *Id.*

Acting as if infrastructure deployment and technology development were investments required only of SMR licensees among all CMRS providers, Southern readily admits that it is seeking to avoid such capital expenditures.[32] The reality is, whether licensed on SMR channels, PCS channels or cellular channels, a CMRS provider faces numerous technical, operational and marketplace challenges that must be overcome to compete effectively. Cellular providers, having deployed analog systems in the late 1970s and early 1980s, have been forced by the marketplace to replace those systems with digital technologies – certainly a "significant investment ...to address these significant technical difficulties. . ." PCS providers, licensed on spectrum previously allocated to microwave facilities, were faced with relocating microwave incumbents prior to building their systems and deploying service – again, not an insignificant investment. Finally, many PCS and cellular providers have found themselves holding both 1.9 GHz PCS spectrum and 800 MHz cellular spectrum, requiring them to develop dual and triple mode phones that could operate on all portions of their system, whether analog, digital, 1.9 GHz or 800 MHz – technology developments that were financed by the carriers seeking to enhance their own services.[33]

The fact that Southern pursued a regional iDEN strategy that limited its system build out to the pre-existing footprint of its parent utility holding company's private

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[32] *See* Comments of Southern at p. 32 (Southern seeks a roaming mandate because providing service on its own spectrum would require Southern to "undertake significant investment to develop the necessary infrastructure to address these significant technical difficulties and reach economies of scale.").

[33] Pacific Wireless asserts that "it is not aware of any PCS or cellular equipment or software that would currently enable [its] customers to roam on PCS or cellular networks. Even if such an advance were available, however, it would not service [its] customers that already have purchased single-mode iDEN handsets." Comments of Pacific Wireless at p. 7, fn. 10. Certainly, no PCS or cellular carrier had access to dual mode technologies until they made the investment to develop such technologies. And, once those dual mode handsets were available, their existing customer base (exponentially larger than Pacific Wireless') was required to change out their existing handsets to access the benefits of the new dual mode phone. Again, like Southern, Pacific Wireless is raising no special issues that have not been previously faced by other CMRS competitors.

internal communications system does not justify regulatory intervention -- particularly when Southern has had and continues to have numerous alternatives to expand its network and when the problems associated with its regional strategy are the result of its own business judgments, not a failure of competition in the CMRS marketplace. It is not the Commission's job to assure Southern or any other CMRS competitor the path of least resistance or a "quick fix." So long as consumers have significant competitive choices – and there is sufficient evidence of competition in the wireless marketplace -- there is no justification for a mandatory automatic roaming obligation.

C. A Roaming Mandate Would Result in Unnecessary Commission Regulation of CMRS Rates, Terms and Conditions

In this era of unprecedented wireless telecommunications competition, an automatic roaming mandate would be a regulatory step backwards. If the Commission were to mandate automatic roaming, it would face numerous issues regarding whether the rates, terms and conditions of a particular roaming agreement are just, reasonable and nondiscriminatory. Since the marketplace would no longer dictate whether to enter into such an agreement, nor dictate the most economic rates, terms and conditions of such an agreement, it would inevitably fall to the Commission to review, adjudicate and approve these matters.

With respect to roaming agreements, as Corr Wireless recognized, the costs may vary from agreement to agreement, and one transaction may be more difficult and costly than another.[34] Additionally, as US Cellular noted, the Commission would be "inviting carrier-to-carrier adjudications involving such questions as whether CMRS carriers may charge higher rates to distant as opposed to neighboring systems, or their own systems as

[34] Comments of Corr at p. 9.

opposed to competitors, or may charge lower rates to carriers with more rather than fewer customers, or whether rural operators can support their buildouts and E-911 costs, for example, through relatively high roaming rates."[35] Even Southern admits in its Comments that there are "numerous variables involved in roaming. . ."[36] Should the Commission choose this regulatory path, on the one hand it must be flexible enough to "allow carriers to continue to differentiate roaming terms based on market conditions[,]" but on the other hand, if the Commission's regulatory framework is too broad, it becomes unworkable.[37]

Given the state of competition in the CMRS industry and the Commission's deregulatory policies of the past decade, it is, as CTIA stated, "by no means clear that the Commission has the resources or inclination to determine the rates and other terms for the many hundreds of cases that would arise with respect to CMRS providers."[38] Additionally, as Justice Breyer stated in his concurrence in *Iowa Utilities*, a mandate such as the proposed roaming obligation would result in the Commission, not the marketplace, being the governor of such agreements:

> Rules that force firms to share every resource or element of a business would create, not competition, but pervasive regulation, ***for the regulators, not the marketplace, would set the relevant terms***.[39]

Thus, an automatic roaming mandate essentially would make the Commission a third party to the roaming negotiation process, particularly as envisioned by Southern. In its Comments, Southern proposes that the Commission establish a process whereby a

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[35] Comments of US Cellular at p. 4; *see also* Comments of CTIA at p. 6 ("Regulatory complexities would surely arise over how to determine whether non-discriminatory rates, terms and conditions are being used and whether carriers are 'similarly situated.'").
[36] Comments of Southern at p. 21.
[37] Comments of Verizon at p. 9.
[38] Comments of CTIA at p. 6.
[39] *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 429 (1999) (emphasis added).

carrier is required to file a written statement of its reasons for refusing a particular roaming request. That written statement would be filed with the Commission within 15 days of the roaming request.[40] The Commission would then be required to review the written statement and determine whether or not the carrier "rightfully" refused to negotiate. If not, the Commission would issue an order requiring the carrier to negotiate with the requesting carrier. Once the negotiations are finished, the carrier seeking roaming would come back to the Commission (via a complaint) for assistance in the negotiating process if it "is not satisfied with the outcome of those negotiations. . ."[41] Thirty days later, the other carrier would file with the Commission its response; 20 days later, a response from the complainant; and 20 days after that, the Commission would act as a settlement facilitator unless the parties certify that such settlement negotiations are "fruitless."[42] After conducting the settlement negotiations, the Commission would review the findings of fact and issue a decision within 30 days.

This process is not only unnecessary given the competitiveness of the CMRS industry, but duplicates the Commission's existing complaint processes. Southern apparently disfavors the Section 208 complaint process and the prospects of seeking relief under Sections 201 and 202 of the Communications Act – perhaps because those provisions do not guarantee the results it desires; accordingly, Southern seeks an automatic roaming obligation. Notwithstanding Southern's disinclination to enter into regulatory proceedings which carry with them the possibility of losing, they provide ample opportunity for the Commission to protect competition and ensure that consumers are not being harmed by the actions of any particular carrier. Therefore, there is no

[40] Comments of Southern at p. 22.
[41] *Id.*

justification for creating an entirely new CMRS regulatory scheme that will force the Commission into regulating the rates, terms and conditions of wireless carriers' roaming agreements. In light of the increasingly competitive CMRS marketplace and the obvious success of the Commission's de-regulatory approach, any move to regulate these aspects of wireless service would be contrary to the public interest and Congress' intentions of creating a CMRS marketplace governed by marketplace forces rather than by Commission intervention.

III. BY PROMOTING A RULE THAT WOULD EXPRESSLY CONTRAVENE THE CMRS REGULATORY PARITY MANDATE, SOUTHERN SEEKS TO ENHANCE ITS OWN COMPETITIVENESS AT THE EXPENSE OF COMPETITION

A. The CMRS Marketplace is the Relevant Marketplace for Analyzing the Need for An Automatic Roaming Mandate

Southern states that "the Commission should focus only on competition between trunked dispatch SMR providers to determine whether an automatic roaming rule should be implemented for digital SMR carriers."[43] This argument should be rejected for two reasons: (a) it ignores the reality of the CMRS marketplace, including Southern's own plans for roaming on Nextel's CMRS network; and (b) it ignores Congress' regulatory parity mandate by singling out one CMRS sub-segment (actually one carrier) for a roaming mandate, thereby creating regulatory disparity among competing CMRS providers. As the Strategis Group recently stated, "[d]ispatch communications is neither an industry nor a distinct technology. Rather, it is an application that can be provided by several different technologies."[44]

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[42] *Id.* at p. 23.
[43] *Id.* at p. 7.
[44] The Strategis Group Report at p. 7.

First, in attempting to justify an automatic roaming mandate that would require Nextel to provide Southern access to Nextel's nationwide network, Southern boldly asks the Commission to limit its analysis to a supposed "marketplace" of services that do not even include the very services Southern seeks to provide via a roaming mandate: interconnected mobile telephone services.[45] **In other words, Southern would have the Commission review the competitiveness of one purported relevant market (*i.e.*, non-interconnected trunked dispatch, or SMR, services) for the purpose of obtaining relief in a different marketplace (*i.e.*, interconnected mobile telephone service).**

To make its relevant marketplace argument, Southern must carve up the CMRS marketplace into arbitrary slices, asking the Commission first to accept that digital SMRs are a self-contained group comprised only of Nextel, Southern and Pacific Wireless competing only among themselves and offering services not generally substitutable with cellular and PCS. Then, Southern makes further fine slices and distorts marketplace reality by portraying a separate market of trunked *dispatch* SMRs, asserting that competition therein is insufficient, thus warranting an automatic roaming rule for digital SMRs. As a result of its analysis, Southern concludes that the Commission should mandate that those digital SMRs, specifically Nextel, provide it access to CMRS networks to enhance its ability to provide nationwide *interconnected* mobile telephone services.

Southern's back-and-forth arguments vividly demonstrate that interconnected mobile telephone services and non-interconnected dispatch services, as well as numerous

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[45] *See* Exhibit A attached hereto, a November 14, 2000 Letter from Robert P. Edwards to Morgan E. O'Brien requesting that Nextel implement manual and automatic roaming as it relates "to the ***800 MHz Motorola iDEN interconnect service*** feature offered by Nextel and Southern alike." (emphasis added) On December 7, 2000, Nextel provided Southern a written response containing proprietary information about